UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MICHAEL J. ALDI, d/b/a ALDI ELECTRIC
and its alter ego ALDI ELECTRIC, INC.

and Case No. 3-CA-21083

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 166, AFL-CIO

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SUPPLEMENTAL DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Albany, New York on July 11 and 12, 2005 pursuant to an Amended Compliance Specification and Notice of Hearing, dated May 5, 2005, and Erratum and Substitution of Corrected Exhibit, dated May 20, 2005, herein collectively called the Amended Compliance Specification. The Amended Compliance Specification alleges backpay and other monetary obligations arising under the decision of the United States Court of Appeals for the Second Circuit, dated December 2002, enforcing the Board's Order of March 16, 1999, which adopted, in turn, the decision of the Administrative Law Judge Bruce Rosenstein. Respondent Michael J. Aldi filed an extensive Answer, dated June 29, 2005, disputing the methodology and assumptions underlying the monetary allegations of the Amended Compliance Specification and raising various affirmative defenses. By letter dated June 29, 2005, the interim, trustee in bankruptcy for Aldi Electric, Inc., in substance, adopted the Answer of Michael J. Aldi, Jr.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, engages in the business of electrical contracting in

Albany, New York. In the underlying Order of the Board, the Board found that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background and Issues for Determination

A. The Decision of Judge Rosenstein

As found in the underlying decision, Michael J. Aldi, Jr., operating under the name Aldi Electric, signed letters of assent, dated October 1, 1990, authorizing the Albany Electrical Contractors Association, NECA Chapter, Schenectady Division, herein the "NECA" as its collective bargaining representative for all matters pertaining to the current and subsequent "inside" and "residential" contracts. The letters of assent provide that they would remain in effect until terminated by providing written notice to the Union and Association at least 150 days prior to the current anniversary date of the applicable labor agreement. The agreements in effect at the time the charge was filed respectively had terms of June 1, 1997 to February 28, 1999 (inside) and June 16, 1997 to April 30, 1999 (residential).

On July 28, 1997, Michael J. Aldi, Jr. formed a corporation, Aldi Electric, Inc., and sometime thereafter ceased operating in the form of an individual proprietorship. No notice was provided to the Union of the creation of the corporate entity. By letter, dated December 3, 1997, counsel for the Union informed Aldi Electric that it was delinquent in meeting its fringe benefit obligations. By letter, dated December 17, 1997, counsel for Aldi Electric responded that Aldi Electric, was incorporated on July 28, 1997 and is a separate entity from Michael J. Aldi, Jr. d/b/a Aldi Electric. The letter added that the d/b/a entity "is terminating its relationship with the union."

Judge Rosenstein made the following legal conclusions:

1. "…Aldi and Respondent are single employers and/or alter egos and cannot unilaterally terminate their collective bargaining relationship with the Union."

2. Respondent continued to operate under the agreement after July 28 and "therefore must be held responsible for all the terms and conditions contained in the collective bargaining agreement."

3. "Aldi's attempt to terminate its collective bargaining relationship with the Union was for the sole purpose of avoiding union wages and benefits.

4. "…Aldi did not comply with the provisions contained in the Letter of Assent. In this regard, Aldi did not give the required 150 days advance notice to the Union of its intention to terminate the agreement and also did not notify the Albany Contractors Association."

Judge Rosenstein's order, adopted by the Board and Second Circuit, inter alia, directs Aldi and the Respondent (Aldi Electric, Inc.) to cease and desist from refusing to honor and apply the current collective bargaining agreement and provides an affirmative make whole remedy applicable to employees and to those who would have been referred pursuant to the agreement's referral procedure.

B. Subsequent Events Reflected in the Amended Compliance Specification

The Amended Compliance Specification is premised on a backpay period of July 28, 1997 to April 30, 2001, reflecting the Regional Director's conclusion that Respondent failed to terminate the letter of assent and hence was bound to the successor agreement between IBEW Local 236 and the Albany Electrical Contractors Association. The Amended Compliance Specification also reflects a conclusion that Respondent was bound to apply the terms of the successor agreement to all work within the jurisdiction of Local 236, an entity formed in February 1999, as a result of a merger of Locals 166, 438 and 724.

C. Hearing Stipulation

In recognition of the substantive issues presented in this case, the parties entered into a stipulation designating Respondent's total monetary obligation under the three possible outcomes framed by the pleadings, as elaborated at the hearing. The stipulation covers the following possible outcomes:

1. The backpay period is limited to the contract periods of the June 1, 1997-February 28, 1999, "Inside" agreement and June 16, 1997-April 30, 1999, "Residential agreement. The agreed upon monetary liability for this outcome is $10,200.

2. The backpay period covers the term of the March 1, 1999 to April 30, 2001 agreement between Local 236 and the Association, and includes all work within the geographical jurisdiction encompassed within that agreement. The agreed upon monetary liability for this outcome is $290,498.

3. The backpay period covers the term of the March 1, 1999-April 30, 2001 agreement between Local 236 and the Association but is applicable only to work within the geographical jurisdiction of Local 166, as reflected in the June1, 1997-February 28, 1999 Inside Agreement. The agreed upon monetary liability for this outcome is $55,195.

For reasons given below, I believe and find that Respondent is only obligated to comply with the first stipulated period.

D. Relevant Facts Adduced at Hearing

George Ternent is Managing Director for the New York State Association of Electrical Contractors. Prior to becoming Managing Director for the statewide NECA, he was Chapter Manager for the Albany chapter of NECA from November 1986 to June 2001. In the position of chapter manager, Ternent negotiated contracts, handled grievances and prepared newsletters for the chapter members. The Albany Chapter of NECA is composed of member contractors in a defined geographical area around Albany, NY. As of date of hearing, it had eleven members. During Ternent's time as chapter manager the membership ranged from a low of nine to a high of nineteen members. The Albany chapter has entered into two collective bargaining agreements with the Union, one called the inside agreement and the other the residential agreement. During his tenure in Albany, there was in effect an inside agreement with a duration of June 1, 1997 to February 28, 1999, and a residential agreement with a duration of June 16, 1997 to April 30, 1999.

Prior to 1999, the geographic territory of the Albany chapter was identical to the geographic area of the jurisdiction of the Union's Albany, Schenectady and Troy locals. The numbers of these local Unions were 724, 166 and 438, respectively. Prior to 1999, the Albany NECA chapter had contracts with five Union locals, those in Albany, Troy, Schenectady,

Plattsburgh and Watertown. Each contract was separately negotiated and contained minor differences, including minor differences in wage rates and benefits. The Troy, Albany and Schenectady locals are known as the Capitol district locals and each had both a residential and inside contract with the Albany chapter of NECA.

In negotiations for these contracts, the NECA chapter and the respective locals would negotiate for changes to the existing agreements. If agreement could not be reached at this level, negotiations would shift to what is called in the agreements the Council on Industrial Relations, (CIR) which meets in Washington, D.C. At this level, the local NECA chapter and the involved local Union present their positions and at a later date, CIR issues a binding decision on the open issues. This procedure was followed in order to reach finalization on the inside agreement with local 166 in 1997.

A member of the Albany chapter of NECA can work as a Union contractor in one or all three of the jurisdictions of the Capitol district locals, by signing what are called a letters of assent to the collective bargaining agreements. Under the terms of the contracts a Schenectady contractor working in Albany would pay benefit assessments to the Albany local, which would then forward the payment to the Schenectady local. A contractor could also work in the jurisdictions of the local as a non-union contractor if it did not sign the collective bargaining agreements or a letter of assent.

GC Exhibit 6 is the Residential agreement for Local 166 with a duration of June 16, 1997 to April 30, 1999. The agreement covers work done on residential occupancy dwellings, including repairs and renovations, up to and including walk up garden style apartments not exceeding four stories. If a question arises about the meaning of this provision, the contractor and Union business manager can discuss the matter. If further interpretation is needed, the question can be submitted for decision to what is known as the Residential Labor Management Committee. Ternent could not remember if Respondent had ever used this procedure.

On December 16, 1998, Ternent received a letter from Michael Barry, Executive Director for the Eastern Region of NECA. It gave notice that effective February 1, 1999, IBEW International President John J. Barry had ordered the amalgamation of IBEW Local Unions 166, 438 and 724 into a resultant local to be known as Local Union 236. Ternent testified that knowledge of the amalgamation of the three existing locals was known to many, though the date of the amalgamation was not known until receipt of Barry's letter. Ternent testified that members of the involved locals and NECA members would be the persons aware of the pending merger. The Albany NECA chapter favored the merger of the three locals because many of its members worked in the jurisdiction of all three. By merging the three, it would significantly reduce the amount of paper work on the part of the member contractors. It would also simplify the question of which local's jurisdiction a job was in.

After the merger, the Albany NECA chapter entered into an inside labor agreement with the new Local 236 that was effective by its terms from March 1, 1999 to April 30, 2001. However the contract was not signed by NECA until April 13, 1999. This agreement was finalized by the CIR by its decision dated February 17, 1999. The new Local 236 prepared a packet of papers detailing the wage and benefit schedule under the new inside agreement. The record is not clear as to whether the Union sends this schedule directly to contractors itself. Ternent testified that when his NECA chapter received this schedule from the Union, it checked it for accuracy, then sent it to its members. Ternent did not send it to letter of assent signatories who are not NECA members. Neither did he send notice to this class of contractors informing them of the upcoming merger of the locals.

Ternent testified that neither Michael J. Aldi, Jr. d/b/a Aldi Electric nor Aldi Electric, Inc., were ever members of NECA. He added that prior to April 1999, neither of these two entities had, in writing, taken any action to terminate the letters of assent signed in 1990. Ternent testified further that prior to April 1999, neither Aldi entity had taken any action to provide notice to NECA concerning the purported severance of their relationship with the Union or severance of their relationship with the Association.

As noted earlier, Aldi signed the involved Letter of Assent in 1990 and gave it to the Union. The Union then sent a copy of it to the Association. Ternent testified that if the Union had received a termination notice from Aldi, they would have informed him of that fact. Both the Union and NECA received a letter from Aldi dated April 1, 1999, terminating his letter of assent.

Aldi was only bound to a contract with one of the locals merged, that being Local 166. . In the jurisdiction of the other two he could operate without adherence to the contracts of those locals. After the merger, the Union contends Aldi was bound by the contract covering all three jurisdictions. NECA did not inquire of the letter of assent signatories whether they were in agreement with the expansion of the Union's jurisdiction after the merger.

Maurice Goyette, Assistant Business Manager of Local 236, was employed by the Local at its inception and then again in October 2004. In the interim five years, Goyette worked for a contractor. Prior to 1999, he had been Assistant Business Manager for Local 166 off and on since 1980. Local 166 received a letter from Aldi's attorney in December 1997 terminating his association with the Union, in response to which the union sent a letter rejecting the attempt. This 1997 letter was not sent to NECA.

After the merger of the three locals, the CEO of the merged union was Bernie Mericle. The other officers of the merged local were employed by the new Local in various jobs. The three local offices were kept open for a time but eventually all were closed except for the office that had previously been that of Local 166. This office then became the office for the new Local in August 2000. Prior to the merger, Local 166 had about 500 members, Local 438 had about 400 members and Local 724 had about 500 members. Prior to the merger there was communication frequently between them, primarily dealing with issues of jurisdiction. New by-laws for new Local had to be written.

Michael J. Aldi began his contracting business as a d/b/a but converted to a corporation in 1997 to shield him personally from potential liability claims. Between the time of incorporation and the spring of 1999, Aldi derived under ten percent of his gross income from work done in Local 166's jurisdiction or about $67,000 to $75,000 in gross sales. Work done outside this area produced about $900,000 in sales.

Hearings in the underlying case took place in May and October 1998. Aldi testified that at some point after the hearing, on the advice of counsel he sent NECA a letter terminating his letter of assent.[1] The date that this letter was supposedly sent is not clear in the record. It was not sent by certified or registered mail and thus no proof of its receipt exists. According to

[1] The letter allegedly sent to NECA was a copy of a letter dated December 17, 1997 and sent to Local 166. This letter was referred to in Judge Rosenstein's decision as the "Capallano" letter.

Ternent, he never received this letter. Aldi was operating under the assumption that when the inside and residential contracts expired in 1999, his letter of assent would terminate and his company would no longer be bound by Union contracts. During 1999, Aldi also told Lee Puller, another contractor and an officer of NECA that he had no intention of continuing to operate as Union contractor. He testified that Puller told him that he knew of the letter Aldi had sent to NECA indicating he would no longer be a Union contractor.

Around September 2000, Aldi was approached by Tim Paley, a business agent for Local 236 and asked to sign the Union contract. He saw Paley again at some point after this conversation and indicated to Paley that if he succeeded in getting about 60 per cent of his work at prevailing wages, he would then sign a union contract. Aldi estimated that this time would come at the end of 2003 or the beginning of 2004. Aldi, however, never achieved the 60 percent threshold.

Aldi testified that during the hearing on the underlying case, he had discussions with Bernie Mericle where they agreed that Aldi would not be subject to the Union contracts when they expired in 1999.

No one from the Union notified him of the proposed merger of the three local and no one asked him to sign a new letter of assent.

E. Discussion and Conclusions.

Under the Order of the Board in the underlying case, Respondent was obligated to honor the Local 166 residential and inside agreements , which expired on April 30, 1999 and February 28, 1999. This is the liability covered by stipulation number 1 above. General Counsel asserts that Respondent failed to give timely notice of intent to cancel the letters of assent to NECA and thus would have been bound to successor agreements with Local 166. I agree. The letters sent to the Union and NECA in April 1999, were not timely under the notice provisions of the letters of assent signed by Aldi. I do not find that it was proven that Aldi sent a copy of the letter to NECA or that it ever received such a letter. The oral communications between Aldi and Pulley, Paley and Mericle clearly do not satisfy the clear requirement of the letters of assent that written notice must be given to the Union and to NECA. See *Haas Electric, Inc.,* 334 NLRB 865 (2001); *Gary's Electrical Service, Co.* 326 NLRB 1136 (1998).

Accordingly, General Counsel and the Union contend that because Respondent did not give written notice to NECA of its intent to cancel the letters of assent it had signed in 1990 at least 150 days before the expiration of the these contract, it became bound by the successor residential and inside agreements between NECA and the new Local 236. I do not agree.

In *Syscon International, Inc.,* 322 NLRB 539 (1996), the Board held, at 544:

"A mere change in the internal structure or affiliation of a union does not excuse the obligation of an employer to bargain with that Union. It is only where and 'affiliation vote is conducted with less than adequate due process safeguards or where the organizational changes are so dramatic that the post-affiliation union lacks substantial continuity with the pre-affiliation union will the Board find the employer's duty to bargain does not continue.' Citing *Sullivan Bros. Printers,* 317 NLRB 561, 563 (1995).

As noted earlier, Respond conducted only ten percent or less of its business in the jurisdiction of Local 166. Of the remainder of its work, some substantial portion was conducted in the jurisdictions of Locals 438 and 724. This work was performed non-union and not in

violation of any agreement by which Respondent was bound. I do not find that the Union can unilaterally triple the geographical scope of its reach and assert that Aldi, as a signatory to letters of assent with Local 166, is bound to operate as a Union contractor in the expanded area without new letters of assent with the newly merged Local 236. In the words of *Syscon,* supra, I find that the geographic change in jurisdiction to be so dramatic to cause the resulting Local 236 to lack substantial continuity with the dissolved Local 166. For Respondent to be bound by the terms of Local 236's residential and inside contracts, it must either became a signatory to those contracts or sign new letters of assent.

General Counsel also asserts that If I find as I have that Aldi is not bound by the Local 236 contracts, then I should find that Respondent is bound by them as least to the extent it operates in the former Local 166's jurisdiction. Local 236 is a different entity from the former Local 166. As noted, it is three times as large geographically. Having found that the Local needed new letters of Assent from Respondent to have it bound by the contracts, I can see no lawful way to create a fictional new contract with a more limited geographical jurisdiction and absolutely no equitable reason to try to do so.

Based on the reasons and cases cited, I find that Respondent was bound by Local 166's inside and residential contracts until their expiration in February and April 1999, and it is not bound by any successor agreements between NECA and Local 236. Pursuant to the parties' stipulation, the monetary liability resulting from this finding is $10,200, to be allocated by the Region Three Compliance Officer. The stipulation made no mention of interest and as it fixed the amounts of potential liability, no interest is ordered to be paid.

Based on the foregoing I issue the following recommended[2]

ORDER

The Respondent, Michael J. Aldi, Jr. d/b/a Aldi Electric and its alter ego, Aldi Electric, Inc., its officers, agents, successors and assigns shall pay the sum of $10,200 to Region Three to be disbursed by the Compliance Officer for Region Three.

Dated, Washington, D.C. January 19, 2006

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Wallace H. Nations
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.